IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO. 3 OF 1999

State of Goa, rep.
by Executive Engineer,
Works Division XX,
Public Works Department,
Fatorda, Margao, Goa. ... Appellant

Versus

Shri Evaristo J.M. Azavedo,
Flat No.G-1, Ground Floor,
Ketan Apartment,
La Campal, Miramar,
Panaji, Goa. ... Respondent.

Mr. H. R. Bharne, Government Advocate for the appellant.

Mr. V. K. Bodke, advocate for the respondent.

CORAM : F. I. REBELLO, J.

DATE : 8th August, 2003.

ORAL JUDGMENT

Disputes having arisen between the parties, reference was made to an Arbitrator, pursuant to the proceedings taken out under Section 20 of the Arbitration Act, 1940. The learned Arbitrator by his Award dated 13th November, 1989, awarded against claim no.1 a sum of Rs.4,75,241/-, against claim no. 4 a sum of Rs.781/- and against claim no.5, Rs.28,098.01. Claim no.4 was allowed as it was admitted by the witness for the respondent. Claim no. 5 is the amount as set out in the final bill prepared by the petitioner herein. Considering that it would not be possible for this Court to interfere insofar as claim nos. 4 and 5 are concerned.

2. The real controversy is in respect of claim no.1. That claim covered claim nos. 1 and 3. Claim no.1 was compensation for loss of overhead and profits upto 5th June, 1982, on account of breaches of contract committed by the Department including fundamental breach for which an amount of Rs.2,54,256/- was awarded and claim no.3 was for overheads and profitability during the extended period

including continued damages payable at Rs.21,200/- per month for 25 months in an amount of Rs.5,30,000/-. The learned Arbitrator insofar as both these claims is concerned, has awarded the sum of Rs.4,75,241/-. The Award came to be filed before the District Court where objections filed by the petitioner herein were rejected by Order dated 21st November, 1998. On rejecting the objections, a decree was made in terms of the Award. Before the learned Additional District Judge, the objections which were pressed were as under:-

(i) That in terms of Clause 25 of the Agreement the Arbitrator was required to give a reasoned award in case the Award was more than Rs.50,000/- and in the instant case, no reasons have been given and thereby the Arbitrator had mis-conducted himself; and

(ii) The learned Arbitrator had erred in holding that the termination of the contract was illegal. It was pointed out that the judgment of the Apex Court in the case of **Hind Construction Contractor vs. State of Maharashtra AIR 1979 SC 720,** was not attracted.

. These were the only two objections which were pressed on behalf of the appellant herein before the learned Additional District Judge. Both the objections were rejected.

3. An appeal has been preferred against the said Order Various grounds have been raised on behalf of the appellant herein. However, considering the objections

raised and pressed before the Additional District Judge, it will not be possible to entertain any objections other than those which were pressed before the Additional District Judge. That leaves for consideration, therefore,the two objections, which are:-

(i) That the Arbitrator mis-conducted himself by not giving reasons as required under Clause 25, considering that the claim awarded was over a sum of Rs.50,000/-; and

(ii) That the finding by the learned Arbitrator that the termination is patently illegal, and consequently perverse.

4. The claim awarded insofar as overheads are concerned is for loss of overhead and profits upto 5th June, 1982, on account of breaches committed by the Department, including fundamental breach. This has, therefore, nothing to do with the termination of the contract. The termination was by letter dated 21st August, 1984. The proceedings under Section 20 were taken out on 16th July, 1985. Under Claim no.3, the claim was for overheads and profits during the extended period, including continuing damages payable at Rs.21,200/- per month for 25 months (till this month). This, therefore, is a claim during the extended period and till the filing of the claim. The stipulated date for completion of the work was 5th June, 1982. That period was extended. The first extension was from 6.6.82 to 31st October, 1982. The second extension was from 1.1.83 to 31st December, 1982 and the third extension was from 1.1.83 to 30th September, 1984. A show cause notice was issued on 23.5.84 as to why compensation should not be levied in terms of the agreement dated 22.5.81. The termination, was by

notice dated 21st August, 1984. While answering issue no.7, framed, namely whether the respondent proved that the claimant did not complete the work inspite of extensions given to him to complete the same quarters, the finding recorded is that the respondent had agreed to complete the work of blocks B and C by 30th September, 1984, but failed to do so and, consequently, the contract came to be terminated. Issue no.4 was whether the respondent proved that several letters and reminders were written by the claimant for completion of the work, but the claimant intentionally failed and neglected to do so and abandoned the work. The learned Arbitrator recorded a finding that all correspondence between the claimant and respondent proves that the claimant did not complete the work and so the respondent had no other alternative but to rescind the contract and withdraw the work from the claimant. This after recording a finding in the affirmative on issue no.2, namely that the claimant had proved that the contract was illegally terminated and work withdrawn from him. The learned Arbitrator held that notice terminating the contract could not be given by the respondent unless first another notice was given to the claimant fixing a reasonable time to complete the work and in case the claimant failed to complete the work within such time, then only the contract could be legally terminated and the work stopped. This was answered in the affirmative by holding that the failure to complete the work was not the fault of the respondent and, consequently, termination of the contract became illegal. Therefore, there are two inconsistent findings, namely that the termination of the contract was illegal on the one hand and secondly on the other, that the respondent herein did not complete the work and that the petitioner had no other alternative but to rescind the contract and withdraw the

work from the claimant.

5. It is in that context that the issue will have to be considered, namely the failure to give reasons as contemplated by Clause 25. On behalf of the respondent, a large number of authorities were cited to contend that once an Award is made even if no reasons are given, the Court ought not to interfere with the Award. This is on a complete misconstruction of the judgments, as the settled law today is that when an Arbitrator under the terms of the contract has to give reasons he is bound to give reasons. The Court may at the highest not consider the sufficiency of the reasons or the reasonableness of the reasons. Reasons however have to be given. My attention was then drawn to the judgment of this Court in the case of Goa Daman and Diu Housing Board vs. Ramakant V. P. Darvotkar, AIR 1984 Bom.120. In that case a Division Bench of this Court held that though the Arbitrator was under obligation to give reasons as required under Clause 25 as each of the claims there was more than Rs.50,000/- he had not done so and consequently the Awards were remitted to the Arbitrator for giving reasons. That matter went in appeal to the Apex Court in Goa Daman and Diu Housing Board vs. Ramakant V. P. Darvotkar, AIR 1991 SC 2089. On the record before it the Apex Court found that the cogent reasons had been given by the Arbitrator and, accordingly, set aside the said Order and made the award a decree of the Court. It will thus be clear that the said judgment does not lay down a proposition that when the clause of the contract requires reasons to be given and if no reasons are given, that would not amount to mis-conduct. On the facts of that case, the Apex Court found that reasons had been given and, consequently, directed that the Award be made a decree of the Court.

. In the instant case, we have the award before us and the reasoning given by the learned Arbitrator for awarding the amounts under claims no.1 and 3 may be gainfully reproduced here:-

> " Issue no.9 corresponds to Claim no.1 and 3 in the order of reference. This claim is admissible but not to the extent mentioned in the reference. The claim mentioned in the claim petition is for Rs.4,75,241-00 due to loss of overheads and profits for the original time limit as well as for the extension period. It is awarded, because of the illegal termination of the contract."

The learned Arbitrator then proceeded to hold, that the principle on which damages have to be assessed in the case of such termination is to place the injured party, as far as money can, in the position in which he would have been had there been no breach of the contract. Reference was made to section 73 of the Contract Act at the and the ruling of the Supreme Court in the case of Ms. Murlidhar Chiranjilal vs. Harishchandra Dwarkadas & Anr.,AIR 1962 SC 366). The learned Arbitrator therefore awarded the sum of Rs.4,75,241/- because of the illegal termination of the contract.

We have earlier adverted to the findings given by the learned Arbitrator both on issue no.2 and issue no.4. There is nothing before the Court to find out what is the amount awarded under claim no.1 and what is the amount awarded under claim no.3 and the basis or the multiplier based on which the amounts were awarded.The learned Arbitrator was bound to give reasons for awarding each of the claims even if he had consolidated the same. There is clearly a breach of Clause 25 of the contract and that would amount to the Arbitrator misconducting the proceedings and, consequently the Award to that extent is liable to be set aside.

6. On behalf of the appellant, learned counsel was seeking to raise an issue that the Arbitrator had no jurisdiction to award the said amount. Such a plea was not raised in the objections taken before the learned Additional District Judge and in these circumstances, it is not possible to entertain the said objections in this appeal arising from the said decree. It is now settled law that a petitioner cannot raise objections which he had not raised or pressed before the Court whether the award was filed. The rest of the Award really cannot be interfered with.

7. However, the matter will have to be remanded to the Arbitrator for giving reasons on issue no.9 which corresponds to claims no. 1 and 3. As the earlier Arbitrator is not available, the Principal Engineer is directed to refer the matter to an Arbitrator who would be a retired Judicial Officer, holding a rank of not less than that of a District Judge, considering that the earlier Award was made by a Judicial Officer of that rank.

8. During the pendency of these proceedings the amount deposited was allowed to be withdrawn on the respondent furnishing a Bank Guarantee in the sum of Rs.5,73,071/-. That Bank Guarantee was not renewed though the money was received by the respondent herein. The respondent is directed within twelve weeks from today, to furnish the Bank guarantee in favour of this Court/Additional Registrar and keep it valid till the decision by the Arbitrator to be appointed, and for a period of three months thereafter. The issue as to whether the amount should be refunded to the appellant alongwith interest if the appellant succeeds before the learned

Arbitrator is kept open for consideration. If the respondent does not furnish the Bank Guarantee as directed the Respondent to deposit the amount in the Court which will then be invested initially for a period of two years and till further order of the court. Liberty to the appellant to apply after the Award is made and filed before the appropriate court.

Appeal allowed accordingly.

F. I. REBELLO,J.

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